PACIFIC CENTRE SDN. BHD.

v.

UNITED ENGINEERS (M) BHD.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CIVIL SUIT NO. 427 OF 1980]
13 JANUARY 1984

CIVIL PROCEDURE: *Injunction - Mareva injunction - Application - Discharge of order under s. 19, Debtors Act - Effect - Jurisdiction on statutory powers - Paragraph 6 of the Schedule to the Courts of Judicature Act - Inherent powers - Merits of the case - Good arguable case - Assets within jurisdiction - Dissipation of assets - Order - Relief sought.*

The plaintiffs applied for a Mareva injunction against two pieces of land ("the Sungei Besi property" and "the Petaling Jaya Property") belonging to the defendants, or against the proceeds of sale thereof, insofar as the proceeds did not exceed RM16,823,443 until the hearing of the action or until further order. The application was made *inter partes.* Earlier, the defendants had obtained an order for discharge of an *ex parte* order made under s. 19 of the Debtors Act 1957.

Held:

A. Preliminary Points

[1] The fact that an *ex parte* order under s. 19 of the Debtors Act 1957, had been discharged did not affect the right of the plaintiffs to apply for a Mareva injunction. The mere fact that such an order had been discharged does not *ipso facto* mean that an application for a Mareva injunction by the same plaintiff on the same grounds is bound to fail. There are a number of important differences between the two remedies.

[2] The fact that the application was made *inter partes* did not give rise to any inference in the circumstances, that it was not a genuine Mareva case. Indeed, *ex parte* interim or interlocutory injunctions should only be applied for where it is genuinely impossible to give notice without defeating the purpose of the order.

B. Jurisdiction

[1] The Court had jurisdiction to grant Mareva relief. It had statutory powers by virtue of s. 6 of the Schedule to the Courts of Judicature Act 1964 to grant the injunction.

(a) *Zainal Abidin bin Haji Abdul Rahman v. Century Hotel Sdn. Bhd.* [1982] 1 MLJ 260, where it was held that jurisdiction for the grant of a Mareva injunction in Malaysia is derived from para. 6 of the Schedule to the Courts of Judicature Act 1964, equivalent to s. 45 of the U.K. Supreme Court of Judicature (Consolidation) Act 1925, was binding on the Court.

(b) The interpretation put forward by the defendants on the judgment in *Zainal Abidin's case,* that only property the subject of a suit can be injuncated, was quite untenable and must be rejected.

(c) There was nothing objectionable in the form which the application took.

[2] The Court had inherent powers by virtue of O. 92 r. 4 of the Rules of the High Court 1980, to grant a Mareva injunction. The Rules have statutory force and are not mere rules of practice.

C. Merits of the case

[1] The plaintiffs had a good arguable case.

[2] The second element, that the plaintiffs must have assets within the jurisdiction, was not in issue.

[3] There was a real risk that the defendants would dissipate their assets.

(a) It was sufficient for the plaintiffs to merely show a risk of disposal of assets which has the effect of frustrating the plaintiffs in their attempt to recover the fruits of any judgment they were likely to obtain against the defendants.

(b) The mere disposal of funds incidental to the defendants' course of business did not, however, come within the scope of dissipation of assets with the intention or with the effect of defeating the plaintiffs' claim.

(c) Regarding the question as to whether the defendants would apply the proceeds of the sale of the Sungei Besi property towards satisfaction of their loans, debts and expenses, the defendants had not discharged the burden which lay upon them. The onus to establish a *prima facie* case for the grant of a Mareva injunction is on the plaintiffs, and if the Court is so satisfied, it has to consider the evidence adduced by the defendants to see if the *prima facie* case has been neutralized or displaced.

D. Order

In the circumstances, the Court would decline to make a Mareva order in terms of the primary relief sought, so that the defendants were at liberty to proceed with the sale of the Sungei Besi property but would make an order that the defendants be restrained pending trial of the action from disposing of or dealing with any part of the net proceeds of the Sungei Besi property insofar as the same did not exceed RM16,823,443 otherwise than by or pursuant to an order of Court.

Cases referred to:

Launch! Research & Dev. Inc. v. Essex Distributing Co. [1977] 4 CPC 361
Zainal Abidin bin Haji Abdul Rahman v. Century Hotel Sdn. Bhd. [1982] 1 MLJ 260
J. D. Barry Pty. Ltd. v. M. & E. Constructions Pty. Ltd. [1978] VR 185
Allen v. Jumbo Holdings Ltd. [1980] 1 WLR 1252
Chartered Bank v. Daklouche [1980] 1 WLR 107
The Pertamina [1977] 3 All ER 324
Kepong Prospecting Smelting Co Ltd. v. Schmidt [1962] MLJ 375
Iraqi Ministry of Defence & Ors. v. Arcepey Shipping Co. S.A. (Gillespie Bros. & Co. Ltd. Intervening) The Angel Bell [1980] 1 All ER 480
Turner v. Sylvester [1981] 2 NSW CA 302
Mckay (Riley) Pty. Ltd. v. McKay & Anor. [1982] 1 NSW LR 264
Bekhor & Co. Ltd. v. Bilton [1981] 2 All ER 565
Siskina v. Distos Compania Naviera S.A. [1979] AC 210
Mareva Compania Naviera v. International Bulkcarriers S.A [1975] 2 Lloyds Rep 509 [1975] 119 SJ 660
Rasu Maritima v. Pertamina [1978] QB 644; [1977] 2 Lloyds Rep 397
Ets Esefka v. Central Bank of Nigeria [1979] 1 Lloyds Rep 445
Third Chandris Shipping Corporation v. Unimarine SA [1979] 1 QB 645; [1979] 2 All ER 972

Montecchi v. Shimco [1979] 1 WLR 1180; [1980] 1 Lloyd's Rep 50
Barclay-Johnson v. Yuill [1980] 3 All ER 190; [1980] 1 WLR 1259
Rahman v. Abu Taha [1980] 3 All ER 409; [1980] 1 WLR 1268
Z. v. A-Z [1982] 1 QB 558; [1982] 1 All ER 556
Faith Panton Prop Plan v. Holgeasts & Anor. [1981] 2 All ER 877
Art Trend Ltd. v. Blue Dolphin (Pte) Ltd. & Anor [1983] 1 MLJ 25
Creatnor case [1978] 1 WLR 966
Yeng Hing Enterprise v. Siow Su Fah [1979] 2 MLJ 240
A. & Anor v. C. & Ors. (No.2) [1981] 2 All ER 126
Re Yong (J.L.) Manufacturing Co. [1900] 2 Ch 753
Wiley, Lowe & Co. v. Gould [1958] OWN 316

Legislation referred to:
Debtors Act 1957, s. 19
Courts of Judicature Act 1964, Schedule para. 6
Rules of the High Court 1980, O. 92 r. 4

For the plaintiffs - Ghazi Ishak; M/s. Presgrave & Matthews
For the defendants - C. Abraham; M/s. Shearn Delamore & Co.

JUDGMENT

Edgar Joseph Jr J:

It has been said that applications for Mareva injunctions are invariably made *ex parte* in the first instance because in a genuine Mareva case the defendant *ex hypothesi* is likely to hasten the removal of his assets once he becomes aware of any application preventing him from doing so. "The whole point of the Mareva jurisdiction," said Mustill J in the *Third Chandris Shipping Corporation v. Unimarine S.A.* [1979] QB 645, 653, "is that the plaintiff proceeds by stealth, so as to pre-empt any action by the defendant to remove his assets from the jurisdiction." In the same way the Court of Appeal in *Mediterranea Raffineria Siciliana Petroli S.p.a. v. Mabanaft GmbH* Unreported [1978] noted by Charity, loc. cit. 356, emphasized the need to "see the stable door is locked before the horse is gone." For this reason, in altogether exceptional and in extreme circumstances, a Judge can entertain a telephonic request by Counsel for a Mareva injunction and, if the matter is satisfactorily explained, make an order accordingly; see, for example, *Allen v. Jumbo Holdings Ltd.* [1980] 1 WLR 1252, 1254, 1255. In this case, however, the application was made *inter partes* because it was a sequel to a successful application by the defendants to discharge an *ex parte* order which I had earlier made under s. 19 of the Debtors Act 1957. In making the order for discharge I merely announced my decision without giving any reasons but I should now wish to make it clear that I did so because I was satisfied on the additional material and the arguments at the *inter partes* hearing that there was insufficient evidence from which I could draw the inference of an intent to obstruct or delay on the part of the defendants within the meaning of s. 19 of the Debtors Act. I did however add a rider that it was open to the plaintiffs, should they so wish, to apply for a Mareva injunction, in which case it would be determined on its merits and after hearing submissions by Counsel on both sides.

In my view, however, the mere fact that an *ex parte* order under s. 19 has been discharged upon application by the defendant does not *ipso facto* mean that an application for a Mareva injunction by the same plaintiff on the same grounds is bound to fail because, amongst other considerations, the points requiring proof for a Mareva injunction are less demanding than those required for a s. 19 order as I shall presently demonstrate and, in doing so, I propose also to deal generally with some of the more obvious differences between these two remedies.

In the first place, s. 19 applications have to comply with strict statutory requirements laid down therein whereas, Mareva jurisdiction rests with the Courts' general discretion and is not circumscribed by statutory requirements.

In the second place, a writ must be issued before an application supported by evidence on oath can be made under s. 19 whereas, in urgent cases, Mareva jurisdiction can be invoked before issue of the writ and, if the situation demands it, on the strength of a draft affidavit with an undertaking to affirm one later: *Chartered Bank v. Daklouche* [1980] 1 WLR 107; *Allen v. Jumbo Holdings Ltd.* [1980] 1 WLR 1252 and *Z. Ltd. v. A.* [1982] 1 All ER 556 . It follows, that Mareva orders can be obtained more speedily than s. 19 orders.

In the third place, the plaintiff in a s. 19 application must satisfy the Court that he has a good cause of action, whereas, in Mareva applications, all he need do is to show that he has a good arguable case (*the Pertamina* [1977] 3 All ER 324, 334). It follows, that the standard of proof required for Mareva orders is lower than that required for s. 19 orders.

In the fourth place, in s. 19 applications, in addition to showing that he has a good cause of action, the applicant would be entitled to an order in his favour if he can also satisfy the Court that the defendant is absent from the Federation and his place of abode cannot be discovered or service of the writ of summons cannot, without a great deal of delay or difficulty, be effected. Proof of an intent on the part of the defendant to obstruct or delay the execution of any judgment is not therefore a *sine qua non.* Whereas, in Mareva applications, the plaintiff must adduce sufficient evidence to raise an inference that there is a real risk, or at least a risk, that the defendant will dissipate his assets with the object, or with the effect, of putting them out of the plaintiff's reach. I shall have more to say about this anon.

In the fifth place, in s. 19 applications, where the plaintiff is relying on sub-section (1)(c) of that section, he must satisfy the Court by evidence on oath, of an intent on the part of the defendant, to obstruct or delay the execution of any judgment, though this can be established as a matter of inference: *Kepong Prospecting Smelting Co. Ltd. v. Schmidt* [1962] MLJ 375. Whereas, a Mareva applicant need only show that there is a real risk, or at least a risk, that the defendant will dissipate his assets with the object, or with the effect, of putting them out of the plaintiff's reach, thus stultifying any judgment he may recover. The Court will not go into the likelihood of prejudice in the shape of dissipation of assets; the risk of it is enough.

In the sixth place, a s. 19 order operates as a form of pre-trial attachment and indeed the heading of Part V of the Debtors Act 1957, under which s. 19 falls, is entitled "Attachment of Property before Judgment." O. 47 r. 6(1), O. 74 r. 5(1), r. 6(2) From 197 para. (b) of the Rules of the High Court and s. 334 of the National Land Code, all confirm this view. A s. 19 order therefore operates as a right *in rem* against its subject-matter. A Mareva order, on the other hand, operates *in personam* against the defendant, restraining him from dealing with or disposing of or dissipating assets affected by it, though there is a conflict of judicial opinion on this point in the U.K.: see, for example, Denning MR, in *Z. Ltd v. A.* [1982] 2 WLR 288.

In the seventh place, there is no requirement for the usual undertaking as to damages from a s. 19 applicant, whereas this is a *sine qua non* in the case of a Mareva applicant.

In any event, in considering the application for discharge of the *ex parte* order under s. 19, I was only concerned with whether **at the time the** *ex parte* **order** was made there was sufficient material to justify its making. I would add that the material and the submissions then before me, were nowhere near as substantial as those now before me.

In the circumstances, no inference that this is not a genuine Mareva case can arise simply because the application was made *inter partes*. Indeed, *ex parte* interim or interlocutory injunctions should only be applied for where it is genuinely impossible to give notice without defeating the purpose of the order: *Launch! Research & Dev. Inc. v. Essex Distributing Co.* [1977] 4 CPC 361.

I must now turn to the application before me, the targets of which are two parcels of land belonging to the defendants, or the proceeds of sale thereof, insofar as the same do not exceed the sum of RM16,823,443 until the hearing of the action herein or until further order. The two parcels of land in question were Lot 262, Section 92, comprised in C.T.24128, Bandar Kuala Lumpur, District of Kuala Lumpur, Wilayah Persekutuan, with an estimated area of 7 acres 0 rood 10 poles ("the Sungei Besi property"), and Lot 61, Section 20, comprised in State Lease 3132, Bandar Petaling Jaya, District of Kuala Lumpur, Selangor, with an estimated area of 3 acres 3 roods 38 poles ("the Petaling Jaya property").

Before I deal with the merits of this application it is, I think, appropriate at this stage, to answer the three challenges to the jurisdiction of this Court to grant Mareva relief raised by Encik Abraham for the defendants.

Firstly, he said he would so far as may be necessary, reserve for the consideration of the Federal Court the point as to whether or not its decision in *Zainal Abidin bin Haji Abdul Rahman v. Century Hotel Sdn. Bhd.* [1982] 1 MLJ 260 which is authority for the proposition that jurisdiction for the grant of a Mareva Injunction in this country is derived from para. 6 of the Schedule to the Courts of Judicature Act 1964, equivalent to s. 45 of the U.K. Supreme Court of Judicature (Consolidation) Act 1925, is correct.

Secondly, he submitted that the judgment of Raja Azlan Shah in *Zainal Abidin's case (supra)* should be given a narrow interpretation so that only property the subject of a suit can be injuncted.

Thirdly, the form of the order sought in this case was based not on s. 45 of the U.K. Supreme Court of Judicature (Consolidation) Act 1925, but on s. 37(3) of the U.K. Supreme Court Act 1981. He pointed out that in *Zainal Abidin's case (supra),* Raja Azlan Shah concluded by saying that para. 6 of the Schedule to the Courts of Judicature Act 1964, was equivalent not to s. 37(3) of the Supreme Court Act 1981, but to s. 45 of the Supreme Court of Judicature (Consolidation) Act 1925. He accordingly submitted that I have no jurisdiction to make the order prayed for.

As *Zainal Abidin's case (supra)* is an authority binding on me, I do not propose to, and indeed cannot, deal with point (1).

Turning to point (2), the facts in *Zainal Abidin's case (supra)* were that the defendant who owned the hotel had executed a lease of the third floor for three years in favour of the plaintiff for use by him as a recreational centre and one of the amenities of the hotel. Due to financial difficulties, eight months after the grant of the lease, the defendant gave notice to the plaintiff that they intended to close down the hotel as a result of which plaintiff issued a writ for wrongful repudiation of the agreement. The defendant had mortgaged and charged the hotel to their parent company and planned to sell it. The plaintiff apprehended that if the sale were to go through the proceeds would be appropriated by the defendant's parent company and there would be nothing left should he successfully recover judgment against the defendant. In the circumstances, he sought an injunction to restrain the proposed sale. Hashim J (as he then was) who heard the application at first instance refused the injunction on the ground that the relief sought was unknown to our law [1982] 1 MLJ 40. From this decision

the plaintiff appealed and the Federal Court held that it had jurisdiction to grant such an injunction by virtue of para. 6 of the Schedule to the Courts of Judicature Act 1964, which it considered was generally *in pari materia* with s. 45 of the U.K. Supreme Court of Judicature (Consolidation) Act 1925, but refused to do so because, on the evidence, the plaintiff's fears were groundless. It is clear, in my opinion, that the fund to which the injunction, if granted, would have attached was not the subject-matter of the dispute. Accordingly, I find that the interpretation put forward by Encik Abraham on *Zainal Abidin's case (supra)* is quite untenable and I have no hesitation in rejecting it.

As regards point (3), which I consider to be extremely technical and devoid of merit, it must not be forgotten that if I have power to grant a Mareva injunction, and that question has been answered in the affirmative in *Zainal Abidin's case (supra),* then, bearing in mind that the jurisdiction to do so is equitable, I can find nothing objectionable in the form which the application now takes.

This is sufficient to dispose of Encik Abraham's challenges to jurisdiction.

I consider, however, that I should go further and deal with the question (1) raised with Counsel during the course of the argument, namely, whether independently of para. 6 of the Schedule to the Courts of Judicature Act 1964, the Court has jurisdiction to grant Mareva injunctions by virtue of its inherent powers confirmed in O. 92 r. 4 of the Rules of the High Court 1980, which provides:

> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

Encik Abraham referred to the case of *McKay (Riley) Pty. Ltd. v. McKay* [1982] NSW CA and submitted that the Mareva injunction must be a creature of statute and as O. 92 r. 4 of the Rules of the High Court 1980, is merely a rule of practice it surely could not be a basis for Mareva jurisdiction.

It seems clear that the Mareva injunction is aimed at the "prevention of abuse" *(Iraqi Ministry of Defence & Ors. v. Arcepey Shipping Co. S.A. (Gillespie Bros. & Co. Ltd. Intervening) The Angel Bell)* [1980] 1 All ER 480, 487 per Goff J (as he then was) and "injustice" *ibid*, 486 which would result from defendants "making themselves judgment-proof by removing their assets from the jurisdiction to shareholders or others who might be amicably disposed, and doing so before judgment and execution". *ibid* p. 484 per quoted passage from judgment of Donaldson LJ (as he then was) rather than protection of the plaintiff's interests. It is also clear that the inherent jurisdiction of the Court includes all the powers that are necessary "to fulfil itself as a Court of Law"; "to uphold, to protect, and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner": Jacob, *The Inherent Jurisdiction of the Court* - (1970) 23 *Current Legal Problems***,** 23, 27 and 28.

In *Turner v. Sylvester* [1981] 2 NSW CA 302 Rogers J thought that there was justification for recourse to the inherent jurisdiction for the granting of Mareva injunctions. This is what his Lordship said:

> As I understand his Lordship's approach he takes the view that any superior Court has an inherent power to prevent abuse. The abuse for present purposes is the utilization of the Court's procedures for defending claims and giving a hearing and the defendant utilizing the time required for such procedures to remove by stealth assets within the jurisdiction. In other words, it pre-supposes a plaintiff who has a wholly justified claim against the defendant. But for the need to go through Court procedures, he would be entitled to repayment forthwith.

> The defendant puts the plaintiff to proof of the ingredients of his cause of action by filing a defence and otherwise invoking the procedures laid down for trials of action. During the time it takes a plaintiff to obtain judgment, the defendant utilizes the time to remove all his assets from the jurisdiction. In this sense, it is said the defendant is abusing the Court's process.

In *McKay (Riley) Pty. Ltd. v. McKay & Anor.* [1982] 1 NSW LR 264 the Court of Appeal of New South Wales supported the above analysis.

English Judges, with the exception of Lord Justice Stephenson, following the traditionalist line, have neatly avoided the question whether inherent jurisdiction can be invoked for purposes of granting Mareva Injunctions. In *Bekhor & Co. Ltd. v. Bilton* [1981] 2 All ER 565 it was argued that jurisdiction to order discovery in aid of Mareva flows from an "inherent or residual jurisdiction" or ".... general residual discretion to make any order necessary to ensure that justice be done between the parties." The Court of Appeal however opted to find jurisdiction in powers incidental to the statutory injunctive power.

I might add, in passing, that I do not consider that there is any substance in the submission that O. 92 r. 4 of the Rules of the High Court is purely a rule of practice. The Rules of the High Court were enacted in exercise of the powers conferred by s. 70 of the Courts of Judicature Act 1964, with the consent of the Chief Justices of Malaya and Borneo and the Rules committee and are comprised in PU(A) 50 which is clearly subsidiary legislation within the meaning of s. 3 of the Interpretation Act 1967. The Rules in my opinion, therefore, have statutory force and are not mere rules of practice. In the result, I hold that there is jurisdiction by virtue of inherent powers to grant Mareva injunctions in this country.

This is sufficient to conclude the arguments as to jurisdiction but before proceeding further I venture to suggest that legislation should be introduced along the lines of s. 37(3) of the U.K. Supreme Court Act 1981, so that Mareva jurisdiction could be placed on a statutory basis in this country.

I must now turn to the merits. Encik Ghazi, for the plaintiffs, pointed out that the following essential elements required proof by his clients:

(a) a good arguable case,

(b) assets of defendants within jurisdiction, and

(c) a real risk that the defendants will or may remove their assets from jurisdiction or dispose of them within the jurisdiction so as to render them unavailable or untraceable.

Encik Abraham, for the defendants, conceded that the three elements mentioned above were all that the plaintiffs need prove to entitle themselves to the orders prayed for. He also conceded that the only issue here was with regard to the third element. Nevertheless, in view of the great practical importance of Mareva injunctions described as a "creative" *(Siskina v. Distos Compania Naviera S.A.* [1979] AC 210, at p. 261, per Lord Hailsham) "procedural innovation" *Ibd.* 253, per Lord Diplock in the House of Lords and by Lord Denning as the "greatest piece of judicial reform" of his time (*The Due Process of Law (1980) 134),* I propose to touch briefly on the requirements of proof with regard to element (1) as well.

The element that the plaintiff must show a good arguable case finds support in the case of *Rasu Maritima S.A. v. Pertamina* [1978] QB 644. This has also been expressed differently, namely, that it must appear likely that the plaintiff will recover judgment against the defendant for a certain or approximate sum : *Z Ltd. v. A-Z Ltd. & ALL* [1982] 2 WLR 288 at 307 B. In the yet unreported case of *Ninemia Maritime Cpn. v. Trave Schiffahrtsgesselshaft mbH Und*

Co. KG (Unreported: Case of *Ninemia Maritime Cpn. v. Trave Schiffahrtsgesselshaft mbH Und Co. KG*, decided on 21 May 1983 in the Queen's Bench Division), Mustill J expounded what he thought was the meaning to be attributed to the phrase "likely to recover judgment" and, after a careful analysis of the authorities, concluded:

> In my judgment, he (Lord Justice Kerr) was doing no more than reiterating that the plaintiff must always demonstrate a likelihood of success, and was not prescribing the degree of likelihood. In these circumstances I consider that the right course is to adopt the test of a good arguable case in the sense of a case which is more than barely capable of serious argument and yet not necessarily one which the Judge believes to have a better than fifty-fifty per cent chance success.

Applying this test, I am satisfied that the plaintiffs here have a good arguable case and I might add that the defendants apparently recognise this as they have taken out third party proceedings to obtain contribution and indemnity. An appeal against the order giving leave to issue third party proceedings having been recently dismissed by the Federal Court.

The second element, namely, that the plaintiffs must have assets within the jurisdiction is, as I have already said, not in issue.

In determining the third element, namely, the dissipation of assets, I have kept in the forefront of my mind, on the one hand, the principle that the Mareva doctrine was not intended to rewrite the English law of insolvency: (per Goff J in the *Angel Bell*, and per Ackner LJ in *Bekhor & Co. Ltd. v. Bilton* [1981] QB 823, per Ackner LJ), that to achieve this end the Mareva injunction does not prevent a defendant from meeting his legitimate business debts out of the injuncted fund *(The Angel Bell) (supra)* and, on the other hand, that propounded by Lord Denning in the *Third Chandris (supra)*, p. 668 at p. 672, namely, whether or not "there was likely to be any risk of default on the part of the defendant" and by Lord Justice Bridge in *Montecchi v. Shinco* [1979] 1 WLR 880, namely, that an injunction would be granted if there was "A real reason to apprehend that if the injunction is not made the intending plaintiff... may be deprived of a remedy....".

There appears to be a difference of judicial opinion as to whether it is necessary for a plaintiff in a Mareva application to establish that the defendant will deal with his assets with the intention and not just with the effect of frustrating the plaintiff in his attempt to recover the fruits of a judgment he is likely to recover against the defendant. The following extracts from various judgments will illustrate this:

In *Mareva Cia Nav v. International Bulkcarriers* [1975] 2 Lloyds Rep 509, 510; [1975] 119 SJ 660, Lord Denning MR at p. 510, said:

> (There is jurisdiction to grant an injunction if) there is a danger that the debtor may dispose of his assets so as to defeat (the debt) before judgment.

In *Rasu Maritima v. Pertamina* [1978] QB 644, [1977] 2 Lloyds Rep 397, Lord Justice Kerr, approved by Lord Denning MR, at p. 527 said:

> On being appraised of the proceedings, the defendant is liable to remove his assets, thereby precluding the plaintiff in advance from enjoying the fruits of a judgment which appears irresistible on the evidence before the Court. The defendant can then largely ignore the plaintiff's claim in the Courts of this country and snap his fingers at any judgment which may be given against him.

In *Ets Esefka v. Central Bank of Nigeria* [1979] 1 Lloyds Rep 445 Lord Denning MR, at p. 448, said:

(The jurisdiction exists) where there is danger of the money being taken out of the jurisdiction so that if the plaintiffs succeed they are not likely to get their money.

and Lord Justice Brandon, in the same case, at p. 449, said:

(The jurisdiction exists where) the assets of the defendants are likely to be removed from the jurisdiction so as to avoid payment of any judgment which the plaintiffs might obtain.

In *Iraqi Ministry of Defence v. Arcepey Shipping Co. S.A.* [1981] 1 QB 65, [1979] 2 Lloyds Rep. 49, Goff J (as he then was) rejected a submission that the purpose of the jurisdiction "is to freeze a foreign defendant's assets in this country to ensure that there is a fund available in this country from which the plaintiff will be able to satisfy a judgment." He added "that the purpose of the jurisdiction was not to rewrite the law of insolvency".... but simply "to prevent the injustice of a foreign defendant removing his assets from the jurisdiction which might otherwise have been available to satisfy a judgment."

In the *Third Chandris v. Unimarine* [1979] 1 QB 645, 672; [1979] 2 All ER 972, Lord Justice Lawton, at p. 672, said:

...There must be facts from which the Commercial Court, like a prudent, sensible commercial man, can properly infer a danger of default if assets are removed from the jurisdiction .... (The Judges of the Commercial Court) have special experience of commercial cases and they can be expected to identify likely debt dodgers as well as, probably better than, most businessmen. They should not expect to be given proof of previous defaults or specific incidents of commercial malpractice. Further, they should remember that affidavits asserting belief in, or fear of, likely default have no probative value unless the sources and grounds thereof are set out .... In my judgment an affidavit in support of a Mareva Injunction should give enough particulars of the plaintiff's case to enable the Court to assess its strength and should set out what enquiries have been made about the defendant's business and what information has been revealed, including that relating to its size, origins, business domicile, the location of its known assets and the circumstances in which the dispute has arisen. These facts should enable a Commercial Judge to infer whether there is likely to be any real risk of default ...

In *Montecchi v. Shimco* [1979] 1 WLR 1180, 1183-84; [1980] 1 Lloyd's Rep 50, Lord Justice Bridge, at pp. 1183-84, said:

.... the basis of the Mareva injunction is that there has to be a real reason to apprehend that if the injunction is not made, the intending plaintiff in this country may be deprived of a remedy against the foreign defendant whom he seeks to sue...

In *Barclay-Johnson v. Yuill* [1980] 3 All ER 190, 195; [1980] 1 WLR 1259, Megarry V.C., at p. 195, said:

(For the jurisdiction to exist) it must appear that there is a danger of default if the assets are removed from the jurisdiction. Even if the danger of removal is great, no Mareva injunction should be granted unless there is also a danger of default.

In *Rahman v. Abu Taha* [1980] 3 All ER 409; [1980] 1 WLR 1268, Lord Denning MR, said:

(An injunction may be granted against a resident of the United Kingdom) if the circumstances are such that there is a danger of his absconding, or a danger of his assets being removed out of the jurisdiction, or otherwise dealt with so that there is a danger that the plaintiff, if he gets judgment, will not be able to get it satisfied.

In *Z v. A-Z* [1982] 1 QB 558, 571, 585-6; [1982] 1 All ER 556, Lord Denning MR, at p. 571, said:

> The Mareva Injunction extends to cases where there is a danger that the assets will be dissipated in this country as well as by removal out of the jurisdiction.

Lord Justice Kerr, at pp. 585-6, said:

> (It is an abuse to use the jurisdiction) in circumstances where there may be no real danger of the defendant dissipating his assets to make himself judgment-proof.

> (Relief should only be granted where) there are reasons to believe that the defendant has assets within the jurisdiction to meet the judgment, in whole or in part, but may well take steps designed to ensure that these are no longer available or traceable when judgment is given against him .... The greatest value of this jurisdiction must not be debased by allowing it to become something which is invoked simply to obtain security for a judgment in advance, and still less as a means of pressuring defendants into settlements.

Because in many cases, there will be a practical difficulty of proving the requisite intent, I prefer the view that it would be sufficient for the plaintiff to merely show a risk of disposal of assets which has the **effect** of frustrating the plaintiff in his attempt to recover the fruits of a judgment he is likely to obtain against the defendant. I am fortified in this view by the following short dictum in the judgment of Raja Azlan Shah in *Zainal Abidin bin Haji Abdul Rahman v. Century Hotel Sdn. Bhd.* [1982] 1 MLJ 260, at p. 264 col. 1 para. F.:

> ... In our opinion the disappearance which the appellant fears in this case of the proceeds of sale does not come within the concept of disposing of assets with the intention or with the effect of defeating a claim.

Encik Ghazi submitted, as regards this part of the case, that he was relying on the defendants' impecuniosity, timing of the proposed sale, and the surrounding circumstances.

As regards the defendants' impecuniosity, he invited me to consider, firstly, the history of the defendant company, in particular, its accounts which he submitted showed a continued loss: for example, in 1981, the loss was RM10,818,000 (p. 12 of the defendants' Annual Report for 1982 being, Exhibit QJF 3, exhibited in the affidavit of Encik Quek Jin Fong, Secretary of the defendants, affirmed to on 13 October 1983 (encl. 132). In 1982, accumulated losses had risen to RM61,511,000 despite an increase in turnover. Total assets of the defendant company as at 31 December 1981 stood at RM158,551,000 (QJF3 p. 12). In 1982, total assets of the defendant company fell to RM109,124,000. He then went on to submit that although looking at the assets of the defendant company in isolation, there appeared to be no cause for concern, if one looked at its liabilities as reflected by its balance sheet as we are left with RM8,513,000 which represents shareholders' funds. He then called attention to the item entitled "Contingencies" in the balance sheet, which, if they crystallized, would amount to RM35,182,000 to be paid out of shareholders' funds. It was submitted that the result of this would be a deficit of RM26,669,000 which, Encik Quek had agreed under cross-examination, "would not be a pretty picture."

Encik Ghazi then dealt with the twin questions of why the defendants wish to effect the sale and what would happen to the proceeds thereof.

For clarity and a better understanding of this part of the case, it is necessary to reproduce the following paragraphs in the affidavit of Encik Quek (encl. 132):

> 20. I am advised by my solicitors and verily believe that there is no evidence as at the present time that the defendants are proposing to dispose of their assets with a view to defeating the plaintiffs' claim. They are merely rationalising their operations and reducing their indebtedness and it so happens that one of their major debtors is their parent Company in Singapore and in the circumstances I am advised in law that the plaintiffs were misconceived in law in applying for the injunction.

...

22. The defendants like a vast number of other Companies in Malaysia and worldwide have suffered from the recession which has caused them some financial problems. The defendants in September 1982 engaged a firm of professional management consultants of International standing to make an in-depth study of the defendants and suggested measures for general improvement of the defendants' operations. The consultants advised defendants that their 2 main landed assets were being under-utilized and that relocation should be considered.

...

25 ... the defendants have not as a matter of deliberate policy attempted to dispose of the assets with a view to only repaying the parent Company in Singapore and thereby defeat its creditors if any. The exercise is merely to reduce its indebtedness and ease its cash flow.

It is also necessary to reproduce para. 3 of Encik Quek's affidavit affirmed to on 18 November 1983 (encl. 140), which reads:

3. The defendants on the sale of the property at Sungei Besi intend to utilize the major portion of the proceeds of sale in the following manner:

(a) to repay the long-term loans to the Bank and to United Engineers Ltd. in accordance with the repayment schedule;

(b) to repay certain other unsecured bank borrowings;

(c) to pay trade creditors, resident abroad and locally in accordance with the credit terms;

(d) to pay the costs of relocating the head office in Petaling Jaya.

Encik Ghazi invited my attention to the company's paid-up capital which was RM50 million, the capital reserve which was RM20,024,000 and the amount owing to United Engineers Limited (U.E. Ltd.), the defendants' parent company, which according to encl. 140 is RM94,661,000 consisting of loans accumulated over a period of some twenty years.

Of the aforesaid sum of RM94,661,000, RM10,000,000 was secured by debenture, a photostatic copy of which was exhibited. U.E. Ltd., incidentally, owns 44.4% of the equity in the defendant company.

Encik Ghazi accepted that the amounts shown in the balance sheet are owing by the defendants to U.E. Ltd. He submitted, however, that a reasonable inference to be drawn from these facts was that the defendants were facing serious financial problems. In fact, the defendants were losing money and would, in all probability, continue to do so.

As to the other unsecured bank borrowings (para. 3(b) encl. 140) and trade creditors (para. 3(c) encl. 140) alleged by the defendants, these, Encik Ghazi said, were bare allegations without specifying how much is going to be paid and to whom. He added that even the amounts owing were not stated nor names of the creditors given. The allegations were too general and amounted to saying "I owe somebody some money" and were clearly insufficient.

He questioned whether, assuming the sales were to go through, the proceeds of it would really go towards settlement of the above loans. He referred to the affidavits filed in support of the application to discharge the *ex parte* order made under s. 19 of the Debtors Act. Nowhere in those affidavits was anything said to show that the defendants intended applying the proceeds of the sale towards the repayment of the loans referred to in para. 3 of encl. 140. All that was there said (see affidavit of Encik Quek affirmed to on 5 April 1983, being encl. 129) was that the proceeds of sale were to be applied to rationalise the defendants' operations.

He also referred to certain newspaper reports, in particular, to the issue of the Star dated 30 March 1983 being, Exhibit JW4, annexed to affidavit of Encik James Wong affirmed to on 22 April 1983 being, encl. 137, which referred to the defendants as being a "loss ridden" company and another issue, also of the Star dated 1 April 1983, being, Exhibit MT 5, annexed to the affidavit of Michael Tan affirmed to on an unspecified date, being encl. 129, which alleged that the defendant Company in a major rationalization exercise was believed to **"hiving off"** its prime properties for cash in an effort to reduce its hefty borrowings and pay off its creditors. These newspaper reports were undoubtedly admissible as the application before me is interlocutory, but I appreciated that they were in the nature of conclusions drawn by the author. Nevertheless, it was submitted that the allegations contained therein were serious and called for rebuttal by the defendants and yet none was forthcoming. The explanation given by the defendants now is that there was no need for them to make any reply because their duty was merely to shareholders and not to the public at large. But I should have thought that the defendants would have been concerned to ensure that their commercial reputation was not tarnished by a failure to rebut such serious allegations. Moreover, the defendants are a public company and members of the public are entitled to know the truth of its financial state. With respect, I find the explanation difficult to accept, and I do not accept it. Nevertheless, I do not place undue stress on this aspect of the case.

Encik Ghazi then cited *A & Anor. v. C. & Anor.* [1981] 1 QB 961 at 963 para. B and also criticised para. 3(d) of the affidavit of Encik Quek (encl. 140) which alleged that part of the proceeds would be applied towards the cost of relocating the defendants' head office. He asked, why even up to now, the defendants had not disclosed the actual cost of this.

He further submitted that the natural thing for a company in the defendants' position with acute financial and liquidity problems would be not to repay its colossal debts but to try and "rise from the ashes by rebuilding itself."

He then made the general submission that once the plaintiffs had adduced *prima facie* evidence for the grant of a Mareva injunction, it was for the defendants to neutralise or displace that *prima facie* case and this they had failed to do because they had not shown a bona fide intention to make the repayments listed in para. 3(a) to (d) of encl. 140.

In reply, Encik Abraham for the defendants, submitted that the main thrust of para. 14, 23 and 29 of the affidavit of Encik Tan, the plaintiffs' managing director, affirmed to on an unspecified date (encl. 129), was that the defendant company was conducting their business in secrecy and that they are capable of disposing of their assets in secrecy. The plaintiffs, he said, should know that this is impossible as they are themselves a publicly listed company and must know of the legal formalities which have to be complied with before they can dispose of their assets. He pointed out that notification to the Kuala Lumpur Stock Exchange (KLSE) was also necessary before a sale such as this could go through and quoted pp. 47-48 in the KLSE Listing Manual. He then referred to Guideline 6 for the Registration And Acquisition of Assets, Mergers and Take-Overs issued by the Economic Planning Unit of the Prime Minister's Department which required Foreign Investment Committee (FIC) and Capital Issues Committee (CIC) approval, both requirements being referred to in the Draft Sale & Purchase Agreement annexed to encl. 132. Not only that, there was also an Extraordinary General Meeting (EGM) to be held in accordance with Art. 53 when the matter of the Sale and Purchase Agreement would have to be debated and decided upon. Such an EGM would be preceded by notices as required under that article. Specifically, the article provides as follows:

The notices convening meetings shall specify the place, day and hour of the meeting and shall be given to all shareholders, at least fourteen days before the meeting. Any notice of meeting called to consider special business shall be accompanied by a statement regarding the effect of any proposed resolution in respect of such special businesses. At least fourteen days' notice of every such meeting shall be given by advertisement in the daily press and in writing to each Stock Exchange upon which the Company is listed.

For all these reasons, Encik Abraham submitted there could be no question of a secret disposal of assets as alleged by the plaintiffs.

Encik Abraham then submitted that an intent to defeat plaintiffs' claims was an essential element for the grant of a Mareva injunction. In support he referred to *Zainal Abidin's case (supra)* p. 264, 1st column, para. F, D and to *Faith Panton Prop Plan v. Holgeasts & Anor.* [1981] 2 All ER 877, 882, line 4 *et seq.* and also cited *Art Trend v. Blue Dolphin (Pte) Ltd. & Anor* [1983] 1 MLJ 25, 30 col. 1 B.

He submitted that in addition, the plaintiffs must show that should they recover judgment there is a danger of default by the defendants: *Third Chandris* [1979] 1 QB 645, 672 C 1.

On the affidavits before the Court, he submitted, it would not be reasonable to infer against the defendants an intent to frustrate the plaintiffs should they succeed in recovering judgment. He submitted that the defendants were perfectly entitled to dispose of their assets to repay their legitimate debts wherever their creditors may be resident and referred to the judgment of Goff J in the *Angel Bell* [1980] 2 WLR 488, 492 G 4 *et seq*. He pointed out that there was no dispute that the debts in question were legitimate, *bona fide* debts.

On the question of the secured loan, namely, the debenture held by the parent company and in respect of which the amount owing as at 30 April 1983 was RM7 million (para. 16 encl. 132), he referred to the *Creatnor case* [1978] 1 WLR 966 where the Court of Appeal held that a debenture holder was entitled to apply for a discharge of the injunction to enable the removal of funds from the jurisdiction because the injunction did not operate as a pre-trial attachment of the assets it being merely a relief *in personam* and merely restrained the defendant personally from dealing with his assets in a particular way.

Encik Abraham then submitted that to make the order prayed for would amount to creating a fund for the plaintiffs in violation of the *Creatnor case (supra)* and also cited *Yeng Hing Enterprise v. Siow Su Fah* [1979] 2 MLJ 240, 244, col. 1 F. He pointed out that there was no evidence that the defendants had taken steps to make themselves judgment-proof. The asset proposed to be sold was only one of several pieces of land owned by the defendants, these lands being particularised in para. 30 encl. 132 and regarding which there was a report by Messrs. Jones, Lang & Wootton, Chartered Valuers, being Exhibit B. He stressed that to grant the order prayed for would result in the abuse which Justice Kerr envisaged in *Z. v. A-Z* [1982] 2 WLR 288, 306 E, F. He further argued that to grant the order prayed for would also paralyse the defendants because the RM16 million would have to be set aside. Few companies, however solvent, could set aside such a colossal sum. In fact, it would precipitate an insolvency. It would also amount to putting pressure on the defendants to give security for the claim and thereby put the plaintiffs in the position of secured creditors. This would be rewriting the law of insolvency and would contravene the principles enunciated by Goff J (as he then was) in the *Angel Bell* p. 495, and by Kerr J in *A-Z-A-Z Ltd.* at p. 306 F.

He next referred to the question of balance of convenience and said that if the order prayed for is granted, third parties, for example, U.E. Ltd. and other creditors, would be prejudiced. He pointed out that the sort of material from which a Court could infer a danger of default was set out by Lawton LJ at p. 671 para. G to 672 C, in the *Third Chandris case (supra),*

and submitted that in this case there was no evidence meeting those requirements. He further submitted that one of the main points made by the plaintiffs was that there is no way they could find out what was happening to the defendants' assets and even if they could they may be too late. In reply, he said that the defendants could not dispose of their assets secretly because of the various legal formalities he had already adverted to. In any case, he submitted that the case of *Bekhor v. Bilton* [1981] 2 All ER 565 shows that there is power to order discovery to facilitate obtaining Mareva injunctions.

Turning to Encik Ghazi's submission regarding the defendants' accounts, Encik Abraham castigated this as selective reading of the accounts. He said that while it was true that the "Contingencies" referred to at p. 22 of the defendants' Annual Report for 1982 were not taken into account this was quite usual. He then referred to p. 22 para. 21(a)(i)(ii) of this Report which reads:

	GROUP		COMPANY	
	RM000's		RM000's	
	1982	1981	1982	1981
Guarantees given to bankers in respect of bank facilities granted to:				
subsidiary companies	-	-	7,291	1,507
associated companies	199	200	199	200
Guarantees given on behalf of customers	15,999	21,885	15,999	21,885

These, he submitted, were only a secondary liability undertaken by the defendants and the same was true as regards para. (a)(iii), which reads:

	GROUP		COMPANY	
	RM000's		RM000's	
	1982	1981	1982	1981
Recourse to the Company by finance houses in respect of their lease and hire purchase arrangements with the Company's customers	1,693	14,299	11,693	14,299

He then referred to p. 23 para. (b) of the Report, which reads:

> As at 31 December 1980, litigation was pending against the Company in respect of a claim for specified damages of approximately RM16,000,000 and unspecified and unquantifiable damages relating to a project completed in previous years. In 1981, further unrelated situations of lesser magnitude came to light which once again were associated with projects completed in previous years.

> The Company is dealing with these situations but at this time it is not possible to determine their eventual outcome. The balance of the unutilised provision for losses that may arise amounts to RM6,333,000 at 31 December 1982 and this is included under other creditors in the balance sheet.

It was true, he submitted, that the plaintiffs were claiming RM16,000,000 by way of damages from the defendants but the question is: what will they recover, assuming they succeed in establishing liability?

As regards the "Contingencies" referred to in the defendants' Balance Sheet which if they crystallized would amount to RM35,182,000, these, he said, would not crystallize at the same time.

He further submitted that it would be wrong to assume that the entire proceeds of sale would be used to repay U.E. Ltd. In answer to the Court, he said only part of it would be utilized to pay U.E. Ltd., mainly moneys relating to the amount secured by debenture, part of it to pay back loans which are unsecured, and part of it to relocate the head office from Sungei Besi to Petaling Jaya: (see para. 3 encl. 140).

I now propose to analyse the main points in the submission made by Counsel for the plaintiffs and the defendants and to give my conclusions thereon.

At first sight, it would appear that Encik Ghazi's case was put, not on the basis that defendants were intending to remove the proceeds of sale out of the jurisdiction or to dissipate them within the jurisdiction with the intention of defeating the plaintiffs' claims, but on the basis that the defendants had suffered, are suffering and would continue to suffer financial adversity in business and were generally impecunious so that they were not a company to be relied upon. This latter ground is as legitimate as the former for, as Mustill J said in the *Ninemia Maritime Corporation case*, ".... or the plaintiff may show what type of company the defendant is (where it is incorporated, what are its corporate structure and assets, and so on) so as to raise an inference that the Company is not one to be relied upon..." Reflection however reveals that by questioning the *bona fides* of the defendants' intention to pay out of the proceeds of sale the debts already referred to, he was in fact implying that the contemplated sale was with the intention of defeating the plaintiffs' claim and I shall therefore assume that his submission is two-pronged.

I think Encik Ghazi was right when he submitted that in the first place the onus was on the plaintiffs to establish a *prima facie* case for the grant of a Mareva injunction and if the Court was so satisfied it had to consider the evidence adduced by the defendants to see if this *prima facie* case had been neutralized or displaced.

I have no hesitation in holding, on the present state of the authorities, that the mere disposal of funds (in this case proposed to be raised by the sale of the Sungei Besi property) incidental to the defendants' course of business, for example, by the repayment of debts, does not come within the scope of dissipation of assets with the intention or with the effect of defeating the plaintiffs' claim. As Lush J said in *J.D. Barry Pty. Ltd. v. M. & E. Constructions Pty. Ltd.* [1978] VR 185, 188 said:

> If an injunction could be obtained in the present case it would either be entirely ineffective to benefit the plaintiff, because the money would stand held for the benefit of creditors generally, or the result would be that a plaintiff could require a defendant to set up a special fund to meet a debt not yet proved, or again, the effect might be to give the particular plaintiff preference over other business creditors.

In the circumstances, an important question of fact which calls for determination is whether the defendants will, as their Secretary alleges, apply the proceeds of sale of the Sungei Besi property towards satisfaction of their loans, legitimate trade debts and for meeting the cost of relocating their head office and workshop.

It is clear that had an *ex parte* Mareva injunction been granted, and had the defendants applied to vary or qualify the order, they would have had the burden of satisfying the Court that there is a good reason for the order to be varied or qualified. "I do not consider," said Goff J in *A. & Anor v. C. & Ors. (No. 2)* [1981] 2 All ER 126, 127 para. J "that in normal circumstances a defendant can discharge that burden by simply saying `I owe somebody some money'." In my opinion, the same principle should apply, where, as here, the application is made, *inter partes*, and the defendants resist it on the ground that they wish to apply the proceeds of the intended sale in relation to their course of business. Applying that test, I do not consider that the defendants have discharged the burden which lies upon them and shall presently give my reasons for this conclusion.

As regards the loan owning to their parent company, the defendants have put in a letter dated 5 August 1983 from the parent company, addressed to them, being Exhibit A, which states:

Our Ref: CYH/CFY/pk

Date: 5 August 1983

The Directors
United Engineers (Malaysia) Berhad
2 Jalan Sungei Besi
Kuala Lumpur
WEST MALAYSIA

Dear Sirs

Accounts to 31 December 1982

At your request we confirm that the United Engineers Limited Group will continue to support United Engineers (Malaysia) Berhad by:

(i) not demanding payment or repayment of monies due in the foreseeable future, except to the extent that funds for that purpose are available to your Group;

(ii) subject to any future agreement which may be made between the two Companies, not withdrawing any guarantees which may have been made on your behalf by members of the United Engineers Limited Group.

Yours faithfully
United Engineers Limited

(Sgd.) Chua Yong Hai
Managing Director.

Amongst those loans is one for RM7 million secured by debenture, to which I have already referred. I am aware that a debenture holder is entitled to apply for a discharge of variation of the injunction to enable the removal of funds from the jurisdiction: *Creatnor Maritime Co. Ltd. v. Irish Marine Managing Ltd*. [1978] 3 All ER 164 but there is no such application before me. All we have is a letter "A" which far from asking for repayment is really an implied promise, made voluntarily, to forbear from pressing for repayment. I might, in passing, mention that, considering the paid-up capital of the defendant company is only RM50 million and the

parent company owns only 44.4% of its equity, the loans, very substantially unsecured, owing by the former to the latter, amounting to RM94,661,000 are indeed monstrous and thought provoking.

As to the other loans owing by the defendants, itemised in para. 3(a) of Encik Quek's affidavit of 18 November 1983 being, encl. 140, I propose to deal with them seriatim.

As to the long-term loan owing to the bank, we do not know which bank is concerned. It is true that the loan is included in the Balance Sheet of the defendants for the year 1982 but surely a Court is entitled to expect proof of a demand for repayment. In passing, I note that the repayment schedules referred to in para. 3(a) of Encik Quek's affidavit (encl. 140) have also not been exhibited.

As to "certain other bank borrowings" referred to in para. 3(b) of encl. 140, no particulars have been given. We do not even know the amounts owing, which banks are concerned or the terms of those loans. Again, there is no proof of a demand for repayment.

The same criticisms would apply to para. 3(c) of encl. 130 which speaks of "Trade creditors resident abroad and locally in accordance with the credit terms."

The cost of relocating the head office referred to in para. 3(d) encl. 140 is not stated although I should have thought there would be no difficulty about specifying this seeing that the defendants have had all the time in the world to do so.

I think there is substance in Encik Ghazi's complaint that the omission on the part of the defendants to mention any of the items (a) to (d) of para. 3 of encl. 140 in the affidavits filed in support of their summons-in-chambers for the discharge of the *ex parte* order I had earlier made under s. 19 of the Debtors Act 1957, makes one suspicious of the *bona fides* of the defendants' present professed intention to apply the proceeds of the proposed sale for the purposes they claim.

There is also the conspicuous omission to put in the Report of the firm of professional management consultants of international standing who it is alleged by Encik Quek in encl. 132 had advised that the Petaling Jaya and Sungei Besi properties were being under-utilized and that relocation should be considered. It is noteworthy that they do not appear to have recommended any sale.

My first thoughts were that I had grave doubts as to the defendants' solvency and had the Sungei Besi property been the only or substantially speaking the only property owned by the defendants I would have had no hesitation in granting the Mareva injunction restraining its sale, which, incidentally, is the primary relief prayed for in the instant application. I pause to say that I have not overlooked the fact that at the time when I made the *ex parte* order under s. 19 of the Debtors Act the defendants had intended to sell not merely the Sungei Besi property but the Petaling Jaya property as well which, according to Encik Quek, constitutes the defendants' "two main landed assets" (see para. 22 of encl. 132). In this context, it is relevant to note that it was alleged by the plaintiffs' managing director, Encik Michael Tan, in para. 13 of his affidavit affirmed to on 19 March 1983 being, encl. 121, and not challenged or contradicted by the defendants "that the Sungei Besi land and the Petaling Jaya land are the defendants' main operational base and also the base for most or all of their eight subsidiaries and associate Companies. On the Sungei Besi land are situate its head office, workshops with heavy plant and equipment and stores for the defendants'

engineering, trading and construction business. Petaling Jaya land is the defendants' base for civil engineering division and also sales of engineering equipment and other goods ..." (see para. 13 of encl. 121).

I recognize that at the base of the Mareva jurisdiction is the principle that disposal of assets would result in the fruits of the judgment in favour of the plaintiff being uncollectable.

It is therefore relevant to probe the issue of resources further and to consider what proportion of the defendants' financial worth is represented by the asset or assets intended to be sold or which is or are being sold.

The only evidence of assets other than that intended to be sold or being sold (the other assets) and their worth appears in the affidavit of Encik Quek affirmed to on the 24 October 1983 (encl. 135) annexed to which is an unauthenticated, unsigned and undated photostatic copy of an extract from a report alleged to be prepared by Messrs. Jones, Lang & Wootton dated 5 January 1982, not made for purposes of these proceedings. Later, during the argument, a copy of that Report, being Exhibit B, was tendered in evidence. I do not regard this as satisfactory evidence of present ownership of the properties concerned let alone of their value. No authenticated abstract of title or even a photostatic copy of any title was annexed.

It is true that Encik Quek has asserted that the defendants owned the lands listed in the extract aforesaid. But he was appointed Secretary of the defendant company only with effect from 10 January 1983, and could not possibly have any personal knowledge of this assertion. His statement must therefore be based on information and belief, and indeed in para. 1 of his affidavit (encl. 135) he has said, *inter alia,* "that the facts deposed to are within my knowledge or alternatively acquired from records to which I have access." So the question arises: what are the records upon which he bases his assertion as to ownership? Are they the defendants' records, and, if so, what do they consist of? Is it the report of Messrs. Jones, Lang & Wootton dated 5 January 1982, Exhibit B? If so, I regard this as being of negligible value because, on the issue of ownership, it would be hearsay at least twice removed and the extract from it would, of course, be even more infirm. In any event, even if the report Exhibit B, and the extract therefrom where treated as acceptable evidence of ownership, they relate to a date two years antecedent in relation to the present proceedings and are, therefore, of no assistance to the defendants.

Perhaps Encik Quek relied on some other record and, if so, this Court is entitled to know what that record is and, in the absence of disclosure, that part of the affidavit is inadmissible: *Re Young (J.L.) Manufacturing Co.* [1900] 2 Ch 753.

In this context, it is pertinent to note that at first Encik Quek merely asserted that the plaintiffs are incorrect in saying that if the Sungei Besi and Petaling Jaya properties are sold the defendants will have no substantial assets to satisfy the plaintiffs' judgment, if any, for the defendants have the following landed properties and other assets, particulars of which are as follows:

(I) Landed Properties

Location	**Value (1982)**
(a) Ipoh	RM4 million
(b) Sandakan	RM1.5 million
(c) Kota Kinabalu	RM1 million
(d) Miri	RM1.2 million
(e) Kuching	RM1 million

(II) Stock in Trade and Work In Progress	RM72 million
(III) Debtors	RM50 million
(IV) Other Fixed Assets	RM2.5 million

However, it was only after I specifically asked Counsel to give particulars of the landed properties and other assets including their values were the Report Exhibit B and the extract concerned tendered in evidence. No particulars were however given of the other assets, that is to say, the Stock in Trade and Work in Progress, Debtors or Other Fixed Assets. As Denning MR said in *Z. Ltd. v. A-Z etc.* [1982] QB 558 at 577 G.:

> If he (defendant) comes on the return day and says that he has ample assets to meet the claim he ought to specify them. Otherwise his refusal to disclose them would go to show that he is really evading payment.

In any event, on such an important aspect of the case, the Court is entitled to expect far more satisfactory evidence. On evidence as to ownership of lands, there should be, for example, a certified copy of an abstract of title or a certified photostatic copy of the issue document of title or an affidavit of result of search at the Land Registry. On evidence as to value of a company's property, there should be expert evidence containing not merely conclusions but also reasons for them and this could take the form of a **recent** signed report or, better still, an affidavit affirmed by the expert (see the precedent at Form 30 p. 148 of *Atkin's Court Forms* 2nd Edn., Vol. 9 1982 Issue).

I might add that there is authority for saying that the Court may refuse to admit an affidavit based on information and belief where better evidence is readily available: *Wiley, Lowe & Co. v. Gould* [1958] OWN 316.

To sum up this part of the case, I hold that there is no admissible evidence or, alternatively, satisfactory evidence before me, that apart from the Sungei Besi and Petaling Jaya properties the defendants own any other landed properties as at the present time, nor for that matter is there satisfactory evidence before me proving that the defendants own any other assets as alleged by Encik Quek. Alternatively, if I am wrong in this, and the Report of Messrs. Jones, Lang & Wootton, being Exhibit B, and the extract therefrom are admissible, and constitute sufficient proof as to the ownership of landed properties at the present time, I am satisfied that the Sungei Besi property and the Petaling Jaya property do in fact constitute a substantial part of the defendants' landed assets and that the plaintiffs have established a likelihood that unless restrained by Order of this Court the defendants will sell these properties. I do not regard the aborted sale of the Petaling Jaya property (for which incidentally no reasons were vouchsafed to this Court) as in any way detracting from this conclusion because it is clear evidence of the defendants' intention to dispose of the same.

As regards Stock-in-Trade and Work in Progress for which RM72 million was claimed there was no apportionment as to how much constituted Stock-in-Trade and how much Work-in-Progress. However, Encik Quek himself admitted in cross-examination that the sum claimed in respect of Stock-in-Trade did not allow for obsolescence and write-off for slow moving stock.

As regards the RM50 million claimed for Debtors, Encik Quek admitted that this included doubtful debts without saying what part this represented.

As for "Other Fixed Assets" Encik Quek said this related to Plant and Machinery and was only his "rough estimate".

In the circumstances, the bare assertions of Encik Quek as to the value of Stock-in-Trade and Works in Progress, Debtors and Other Fixed Assets claimed to amount to RM124.5 million I would regard as totally inadequate as they have not been substantiated properly or at all.

I think I should, at this stage, make a general observation regarding the impression Encik Quek made upon me as a witness whilst under cross-examination. Quite frankly, his oral testimony did not inspire confidence especially, on matters relating to the defendants' accounts, solvency and resources. In a number of instances, he did not seem sure as to what he was saying. This, I thought, was especially surprising since he is an Accountant, albeit not a Chartered Accountant.

There was, incidentally, no request by the defendants for leave to cross-examine any of the deponents on whose affidavits the plaintiffs relied.

It is also worth mentioning that dealings in shares of the defendant company on the Kuala Lumpur Stock Exchange have been suspended and apart from the present suit there are two other claims pending against the defendants for the recovery of substantial sums of money arising out of two other projects undertaken by them, one involving the City Bank Building, Penang, and the other at Desa Kuda Lari, Kuala Lumpur. The former is the subject of an action being, Penang High Court Civil Suit No. 288/83.

Finally, I might add that as recently as 24 December 1983, the Star newspaper reported as p. 41 of its issue of that date in an article entitled "U.E.M. Confirms Sale of Sungei Besi Property" that the defendants signed the conditional sale and purchase agreement to sell the Sungei Besi Property to Malayan Breweries for RM18.1 million cash. I verified the accuracy of this report by asking the Senior Assistant Registrar to make the necessary enquiries from Encik Abraham and she reported in the affirmative adding that a deposit towards the purchase price was now with the solicitors for the vendors. I then asked for an undertaking from Encik Abraham that his firm who were the solicitors concerned would not part with the deposit or indeed the purchase price until the final determination of this application. This has now been duly furnished.

Prima facie such conduct in hurrying along with the sale, knowing that judgment in an application to halt that very sale is still pending, would appear to be a material factor for me to take into account since the Mareva injunction is a species of equitable relief where general equitable considerations apply. However, since I am not aware as to the reasons which prompted such a course of action and, as the agreement for sale and purchase is subject to various approvals being obtained, I shall refrain from drawing any adverse inference against the defendants on this score.

I might add that my attention was drawn to the recent unreported judgment in *Penang Garden Sdn. Bhd. & Anor. v. United Engineers (M) Berhad Penang* Civil Suit No. 288/83. I regret that I do not consider it to be of any assistance as the evidence relied upon by the defendants was accepted at its full face value and, as a result, none of the infirmities therein, to which I have referred, were probed sufficiently, or at all.

In the circumstances, I decline to make a Mareva order in terms of the primary relief sought, so that the defendants are at liberty to proceed with the sale of the Sungei Besi Property but, on the usual undertaking as to damages by the plaintiffs, reinforced by a further undertaking of a like nature by the plaintiffs' parent company, namely, M.B.F. Holdings Berhad, the sufficiency of whose undertaking the defendants do not contest, I make an order that the defendants be restrained pending trial of the action by itself, its servants or agents,

from disposing of or dealing with any part of the net proceeds of sale of the Sungei Besi property insofar as the same do not exceed RM16,823,443 otherwise than by or pursuant to an order of court. This does not mean that these proceeds will necessarily remain sterilized for the benefit of the plaintiffs for the Court can permit the defendants to use them for paying *bona fide* debts as they fall due and upon sufficient proof of an intention to do so: see *Iraqi Ministry of Defence v. Arcepey Shipping Co. S.A. (supra)* and provided always the defendants are able to rebut the inference of a real risk of default (the *Third Chandris (supra)* per Denning MR at p. 672) which I have drawn from the evidence now before me.

It follows, therefore, that it would be open to any creditor of the defendants, and indeed to the defendants themselves, to apply for a variation of this order if they so wish.

In the result, I uphold both prongs of the plaintiffs' submissions aforesaid and order that the costs of this application be paid by the defendants to the plaintiffs.

Also found at [1984] 2 CLJ 56